K-Mart Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7–CA–42082 and 7–RC–21537

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On March 28, 2000, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified below.[2]

1. The judge found that the Respondent violated Section 8(a)(1) of the Act when General Manager Bellerose solicited employees to report to management any perceived harassment or pressure by union supporters. The Respondent contends that Bellerose did not direct employees to report any such harassment. The credited testimony, however, establishes that Bellerose told employees in meetings in March and April 1999,[3] "that if any employee was harassed by another employee talking about the union. To come and report it to him," and that "if anybody felt harassed about the union to come to him and he will deal with it." See *Publishers Printing Co.*, 317 NLRB 933, 934 (1995), enfd. mem. 106 F.3d 401 (6th Cir. 1996); *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979).

2. The judge also found that the Respondent violated Section 8(a)(1) when, on about May 4, Human Resources Director Gilooley told employee Macer that she was not selected for a human resources position because the Respondent "had to take into consideration who [her] friends [were]," referring to the fact that Macer had brought a union organizer as a guest to the Respondent's May 1 open house. The Respondent argues that, even if Gilooley made this statement, it was not unlawful because an employer may legitimately consider an employee's union affiliation when staffing positions involving access to confidential labor-relations information. We find it unnecessary to reach this argument, though, because it is clear that Macer's appearance at the open house with a union organizer was not a factor in the Respondent's decision, since the Respondent had already awarded the human resources position to another applicant on about April 29. Thus, Gilooley's statement was a wholly gratuitous attempt to convey to Macer the Respondent's disapproval of her union affiliation and to discourage such affiliation. In these circumstances, we agree with the judge that Gilooley's statement was unlawful. See *R. L. White Co.*, 262 NLRB 575, 585 (1982) (in midst of antiunion campaign, employer's gratuitous statement of management's right to discharge employees after election for poor workmanship violated Sec. 8(a)(1)).

3. The judge also found that, during the April 5 birthday party meeting, Bellerose unlawfully threatened employees that whether they would be given the opportunity to work at the leased Toys R Us annex in the future depended on the outcome of the election. The credited testimony established that Bellerose told employees at the birthday party meeting that the Respondent was "using the S&W workers at that facility because he couldn't afford to send anyone from our Company, the K-Mart Corporation, over there *at this time*." (Emphasis added.) Bellerose then explained that the Respondent might purchase the annex depending on the outcome of the union election and that, if the Union won the election, the Respondent would transfer its operations from the Canton warehouse to the annex and use only temporary employees to perform that work. We agree with the judge that Bellerose thereby implicitly threatened "that whether the non-cons employees were transferred to the Toys R Us annex in the future, depended on the outcome of the election."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has excepted to the judge's failure to find unlawful Supervisor Chuck Robinette's interrogation of employees on March 15 as to why they supported the Union. We find no need to pass on this finding because it would be cumulative of the judge's finding of an 8(a)(1) violation based on Robinette's interrogation of employees on March 16 and would not affect the remedy for such unlawful conduct.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

By letter dated October 30, 2000, the Charging Party requested withdrawal of its election objections in Case 7–RC–21537. On November 7, 2000, the Board granted the Charging Party's request, severed Case 7–RC–21537 from the instant unfair labor practice charges, and remanded Case 7–RC–21537 to the Regional Director for appropriate action. Accordingly, we delete that part of the judge's recommended Order directing that the election conducted in Case 7–RC–21537 on May 13 and 15, 1999, be set aside, and that a new election be held.

[3] All dates are in 1999, unless stated otherwise.

The Respondent contends that Bellerose's comments could not have been threatening in light of the Respondent's previous explanation to employees on March 8 that the Respondent had decided to use temporary employees from S&W Logistics because it was having trouble hiring additional workers. As described above, however, the violation centers on Bellerose's predictions about the *future* staffing of the annex. The lawfulness of the Respondent's initial staffing decision is not at issue.

4. The judge further found that the Respondent violated Section 8(a)(1) when, during captive-audience speeches on May 4 and 5, Senior Vice President Mixon threatened that it would be futile to elect a union at the Canton facility. As the judge found, Mixon first informed employees that the Respondent was considering outsourcing all of the work at its unionized facility in Greensboro, North Carolina, and, then, warned:

> If the Union comes in, we will have no choice but to take a hard look at whether [Canton] should be treated any differently than our other unionized DC's. That's not personal, and it is not intended as a threat. That's business. That's an economic reality. Looking at the big picture, why should Canton, if it goes Union, have a better deal than Greensboro or our softline DC's?

We agree with the judge that Mixon's remarks reasonably threatened that supporting the Union at the Canton facility would be futile because the Respondent could just outsource the employees' work. In this respect, we note, as did the judge, that Mixon's own self-serving statement that his comments were not intended to be threatening supports a finding that his comments could reasonably be perceived as such by employees.

Contrary to the Respondent's contention, that Mixon's statement regarding Greensboro may have been supported by objective facts is irrelevant. As the judge correctly observed, the question is whether there was "evidence that [Mixon's] remarks were based on objective facts to support a reasonable belief as to the likely economic consequence of unionization *at Canton* that was beyond the Respondent's control." (Emphasis added.) The judge found no such evidence.

The Respondent's assertion that there was no evidence that a decision to outsource the work at Greensboro would result in a similar course of action at Canton misses the mark as well. Whether or not Greensboro's fate would in fact determine the fate of Canton is beside the point. As the judge found, Mixon's rhetorical question to employees—"why should Canton, if it goes Union, have a better deal than Greensboro or our softline DC's?"—threatened that Canton would be treated the same as Greensboro. The threat, alone, violated the Act.

5. Finally, the judge found that the Respondent violated Section 8(a)(1) on May 11 when it posted a memorandum announcing a 50-cent-per-hour wage increase, and on May 12 when Assistant General Manager Tripp emphasized the wage increase in a series of "25th hour" preelection meetings with employees. We affirm the judge's finding. As discussed in the judge's decision, it is well established that an employer cannot time the announcement of increased benefits to dissuade employees from supporting the union. *Waste Management of Palm Beach*, 329 NLRB 198 (1999). As the Board noted in that case:

> [I]t is clear that an employer's right to recite for employees the benefits bestowed upon them prior to the union's appearance includes the right to announce the culmination of any nonunion related efforts to improve those benefits when such efforts naturally come to term, even in the period of an organizing campaign. The announcement becomes perilous, however, when the employer has, and exercises, discretion in choosing the time for the announcement; timing may not be manipulated to heighten the impact of a new benefit, a subject to which employees are keenly sensitive.

Id. at 199 fn. 4 (citing *Speco Corp*., 298 NLRB 439, 443 (1990)). Further, it is the employer's burden to show that the announcement would have been made at the same time even if there had been no union activity. Id. at 198.

We find that the judge properly applied these principles in finding that the posting of the memorandum announcing the wage increase on May 11 and Tripp's discussion of that increase during the 25th-hour meetings were unlawful. As found by the judge, the Respondent's practice prior to 1999 was to announce forthcoming wage increases in mid-May and to thereafter present and explain the increases in formal group meetings with employees. Here, the Respondent announced in a memorandum posted on May 11 that there would be a wage increase and informed employees that the group meetings to discuss the specifics of the increase were being postponed until after the election to "avoid the appearance of trying to influence your vote." In the same breath, though, the Respondent immediately outlined the details and implementation of the wage increase.[4] Then, on May 12, Tripp seized on and emphasized the wage increase in the 25th-hour preelection meetings as part of the Respondent's final push to discourage union support. Tripp read and distributed to the employees a May 12 letter from Senior Vice President Mixon, which, as found by the judge, focused on the wage

[4] We do not rely on the fact that the Respondent mentioned the election in its May 11 memorandum. See *Ansul, Inc*., 329 NLRB 935 (1999).

increase and boasted that this increase would add up to over $1000 per year for most employees.[5]

Based on the foregoing facts, for the reasons set forth by the judge in section II,H of his decision, we agree that the Respondent failed to satisfy its burden of showing that the posting of the May 11 memorandum and the discussions at the May 12 meetings were consistent with past practice and were governed by factors other than the election. Cf. *Columbian Rope Co.*, 299 NLRB 1198, 1198–1199 fn. 6 (1991) (employer violated Sec. 8(a)(1) by deciding in its discretion to announce wage increase on day before representation election).[6]

The Respondent contends that the Board has not provided clear guidance to employers on how to handle regular wage increases that coincide with organizing campaigns. On the contrary, as the Respondent recognizes in its brief, it is settled that an employer's obligation is to adhere to its established practices as if the union were not on the scene. See *United Airlines Services Corp.*, 290 NLRB 954 (1988). Moreover, even where an employer is legitimately concerned about the consistency of its practices, Board precedent makes clear that the employer may avoid liability by postponing action relating to the wage increase until after the election, provided the employer gives employees certain assurances. See *Ansul, Inc*., 329 NLRB 935 (1999) (employer lawfully informed employees that it was delaying the announcement of the results of its wage review until after the election); *Kauai Coconut Beach Resort*, 317 NLRB 996, 996–997 (1995). As the judge found, the Respondent neither adhered to its established practice nor postponed the announcement of the wage increase.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, K-Mart Corporation, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Delete from the recommended Order the following sentence: "IT IS FURTHER ORDERED that the election conducted in Case 7–RC–21537 on May 13 and 15, 1999, be set aside, and that a new election be held at such time and under such circumstances as the Regional Director shall deem appropriate."

CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues and the judge, I would find that the Respondent's May 12, 1999 announcement of a wage increase during a series of preelection meetings at its Canton, Michigan warehouse facility did not violate Section 8(a)(1) of the Act.

Pursuant to the procedures and timing of a wage review process that it had utilized annually since 1997, the Respondent's corporate officials on May 11, 1999, informed its managers at all of its nonunionized distribution centers that there would be an employee wage increase effective May 31 and instructed them to schedule employee meetings to explain the wage increase as soon as possible. Pursuant to this directive, management at the Respondent's Canton facility posted a memo on May 11, which announced that all eligible employees would receive a pay increase effective May 31. The memo also provided a general summary of the pay increase. The memo also stated that the pay increase did not depend on the outcome of the election, which was to begin on May 13. Thereafter, during preelection meetings with employees on May 12, the Respondent made reference to the pay increase, and its practice of granting annual pay increases. Respondent did so in the course of addressing union claims that the Respondent was intending to reduce employees' pay. During the week after the election, the Respondent made formal presentations concerning the wage increase at employee meetings.[1] On the basis of these facts, the judge, in section III,H of his decision, found:

> [C]ontrary to the General Counsel's assertions . . . the [Respondent's] determination to confer a wage increase and the timing of the post-election formal presentations at the Canton facility were conducted in the normal course of business and without any motive of inducing the employees to vote against the Union.

No party excepted to this finding. Thus, it is established that the Respondent's decision to increase wages was made in the normal course of business and was not motivated by a desire to influence employees to vote against the Union.

Even though it is conclusively established that the Respondent's wage increase decision was lawful, my col-

[5] Contrary to our dissenting colleague, we do not think Tripp's speech may be fairly characterized as simply "mentioning" the wage increase.

[6] Our dissenting colleague emphasizes that the judge found that the Respondent's *decision* to increase wages was not motivated by a desire to influence employees to vote against the Union. We accept the judge's finding, to which no party has excepted. That finding, however, is not inconsistent with the judge's further finding that the Respondent's *announcement* of the wage increase violated the Act. See, e.g., *Waste Management of Palm Beach*, supra, 329 NLRB at 198 fn. 3 (rejecting then-Member Hurtgen's dissenting position).

[1] A formal presentation is a presentation package prepared by Respondent's vice president.

leagues nevertheless find that the Respondent violated Section 8(a)(1) merely because it failed to remain mute about this decision until after the election. However, as my colleagues acknowledge, "an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene."[2] The Respondent followed that rule here. Further, in telling the employees about the wage increase prior to the grant thereof, the Respondent followed the same practice that it had used in prior years.[3] Nevertheless, my colleagues fault the Respondent for mentioning the wage increase in its preelection meetings, which were held after the Respondent issued a memo announcing the wage increase.

In my view, as it is established that the wage increase itself was lawful and as the Respondent's May 11 announcement of the wage increase by memo was consistent with the Respondent's past practice, the Respondent's mention of the pay increase at its May 12 preelection meetings was clearly lawful. Contrary to my colleagues, the Respondent's mention of the pay increase in the preelection meetings cannot itself be condemned as inconsistent with past practice. As in past years, Respondent decided on a wage increase and announced it prior to the grant of the increase. The decision was made on May 11, and it was announced by memo on May 11 and by meetings on May 12. The sole difference is that, this year (1999), the "formal announcement," i.e., presentation package prepared by Respondent's vice president, was not made until after the election. Respondent explained the delay, and told employees that the increase would not be dependent on the election results. *Columbian Rope Co.*, 299 NLRB 1198 (1991), on which my colleagues rely, is not on point. In that case, the employer in July announced that it was postponing consideration of an August pay increase until November 1. The Board found that the employer's subsequent November 1 announcement of a pay increase was an unlawful attempt to influence its employees' votes in the November 2 election, as the employer was obligated only to consider a pay increase on November 1, not to announce an increase on that date. Further, the previous year, it had not granted the August pay increase until October. By contrast, in the present case the Respondent followed its consistent practice of annually initiating a wage review process in February or March and announcing the resulting pay increase in May.

Accordingly, I dissent from my colleagues' finding that the Respondent's mention of its lawful wage increase violated Section 8(a)(1).

[2] *United Airline Services Corp*., 290 NLRB 954 (1988).

[3] Contrary to my colleagues, I find that the memo's reference to the election was natural in the context of the impending election and did not in itself represent a substantial deviation from past practice.

Patricia A. Fedewa, Esq., for the General Counsel.
D. Christopher Lauderdale and *Glenn L. Spencer, Esqs.,* of Greenville, South Carolina, for the Respondent.
Betsey A. Engel, Esq., of Detroit, Michigan, for the Union.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Detroit, Michigan, on September 20–23, 1999, based on a charge filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (Union) on May 28, 1999,[1] as amended on July 29, 1999. The complaint, which issued on August 4, 1999, and as amended at the hearing (GC Exh. 2), alleges that during the course of the Union's organizing campaign the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and disparately enforcing an overly broad no-solicitation and no-distribution rule contained in its employee handbook; orally promulgating a rule which prohibited employees from discussing union-related subjects during working time and prohibiting employees from distributing union literature after work hours at the entrance to the Respondent's facility; encouraging employees to report to management employees who pressured or harassed them to support the Union; coercively interrogating employees about their support for the Union; threatening employees with loss of benefits for supporting the Union; threatening to outsource or consolidate operations if the Union was elected; telling employees that it would be futile to select the Union as their collective-bargaining representative; granting employees benefits in order to discourage their support for the Union; and announcing a wage increase in order to discourage employee support for the Union. Objections filed by the Union to an election conducted on May 13 and 15, 1999, in Case 7–RC–21537, were consolidated for hearing with the unfair labor practice charges.

The Respondent's timely answer denied the material allegations of the complaint. The Respondent also denies having engaged in any objectionable conduct. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is a general merchandise retailer with a distribution center (i.e., warehouse facility) located in Canton, Michigan, where it receives, stores, and ships goods and products. During the calendar year ending December 31,

[1] All dates are in 1999, unless otherwise indicated.

1998, the Respondent's Canton distribution center derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points located outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Motion to Strike

On brief for the first time, the General Counsel argued that the Respondent "coercively" distributed "Vote No" T-shirts to employees during the organizing campaign. Specifically, it is asserted that K-Mart Supervisors Jerry Walker, William Kaiser, and Charles Robinette coercively distributed "Vote No" paraphernalia to employees in violation of Section 8(a)(1) of the Act, citing *A. O. Smith Automotive Products Co*., 315 NLRB 994 (1994) (GC Br. at p 19). The Respondent therefore filed a posthearing motion to strike the allegation on the grounds that the conduct is not alleged in the complaint nor did the General Counsel seek to amend the complaint at any time to allege such a violation. The Respondent further asserts that to find a violation based on this allegation would be a denial of due process. *Henry Bierce Co. v. NLRB*, 23 F.3d 1101 (6th Cir. 1994). I agree.

In *Henry Bierce Co*., the Sixth Circuit Court of Appeals established a rubric for determining whether a Respondent's due process rights have been violated. The appellate court succinctly stated that the fundamental elements of procedural due process expressed in decisional law are notice and an opportunity to be heard. The Administrative Procedure Act likewise requires timely notice of all matters of fact and law involved. The Sixth Circuit, however, recognized a limited exception to the general rule: that is, if such notice is not timely provided, an agency may nevertheless decide the issue if the Respondent had the opportunity to fully and fairly litigate the issue. 23 F.3d at 1106–1107

The allegations in the complaint are very succinct and tightly drafted. They do not allege, either expressly or implicitly, that the Respondent coercively distributed "vote no" paraphernalia to employees; that is, in a manner as to pressure employees to make an observable choice or open acknowledgement concerning their position in the union campaign. *A. O. Smith Automotive Products Co.*, supra. At the hearing, the General Counsel did not attempt to amend the complaint or otherwise raise the issue. Nor did the General Counsel move to amend the complaint in her posthearing brief to allege that antiunion paraphernalia was coercively distributed by supervisors.

Instead, the allegation is subtlety introduced in the General Counsel's posthearing brief at page 19 by asserting that "[n]ot only do Walker, Kaiser, and Robinette's handing out 'Vote No' paraphernalia evidence Respondent's disparate treatment with respect to solicitation, but it is also coercive. *A. O. Smith Automotive Products Co*., 315 NLRB 994 (1994)." Thus, I find that there was no formal notice of the alleged coercive distribution at any point in this proceeding.

Nor does the record reflect that the Respondent was informally notified of the unpleaded issue. Although employee witnesses Arnold Gregory and Larry Nagy testified that Supervisors Walker, Robinette, and Kaiser distributed "Vote No" materials to employees, their testimony was submitted to show that the Respondent had disparately enforced its no-solicitation policy. At no time during the hearing did the General Counsel allude that this evidence was directed at an allegation of coercive distribution. There is nothing in the record that suggests that the Respondent understood this evidence to be directed to an unpleaded issue. Thus, I find the Respondent did not impliedly consent to litigate the unpleaded issue of coercive distribution.

The final question is whether the Respondent had a full and fair opportunity to litigate the allegation that its supervisors coercively distributed antiunion paraphernalia, even though it did not consent to do so. In the context of litigating the issue of disparate enforcement of a no-solicitation policy, there was testimony from both sides concerning the distribution of antiunion paraphernalia, including "Vote No" T-shirts. However, if the Respondent had known about the new allegation at the hearing, it may have presented additional evidence in defense of the "coercive nature" charge. I therefore find that the Respondent did not have a full and fair opportunity to litigate the new allegation that was raised for the first time indirectly in the General Counsel's posthearing brief.

According, I grant the motion to strike the allegation that Supervisors Walker, Kaiser, and Robinette coercively distributed "Vote No" paraphernalia in violation of Section 8(a)(1) of the Act.

B. Background

The Respondent is a nationwide general merchandise retailer with retail stores located throughout the United States. Merchandise for these stores is received, configured, and distributed from distribution centers (i.e., warehouses). The Respondent's distribution center in Canton, Michigan, services approximately 134 stores in three States. It employs approximately 634 associates, who work on three shifts in one of the following departments: receiving, nonconveyable (noncons),[2] repack, put-+/*away, shipping, and offices.

In late December 1998, the Union initiated an organizing campaign seeking to represent associates employed at the Respondent's Canton distribution center. On March 26, 1999, the Union filed a representation petition seeking to represent the following unit:

> All warehouse associates, warehouse clerical, office clerical,maintenance; skilled and general, and also including all general warehouse employees; excluding, supervisors, guards, confidential employees, and all other employees excluded under the Act.

A Stipulated Election Agreement was approved on April 12, an election was conducted on May 13 and 15, and the Union was defeated. On May 21, the Union filed objections to conduct allegedly affecting the outcome of the election followed by related unfair labor practice charges.

[2] The noncons department handles bulky items such as dog food and televisions that cannot be moved on conveyor belts.

C. Events of March 1999

1. Neil Currin distributes prounion literature in the cafeteria

On or about March 11, 1999, employee Neil Currin passed out a prounion newsletter in the cafeteria during his break. Currin testified that General Manager Bill Bellerose approached him as he placed copies of the newsletter on the end of the cafeteria tables. According to Currin, Bellerose stated that he did not want him passing out any literature and asked him to come to his office. As they walked to Bellerose's office, Currin explained that he was on break and that he was passing out a union newsletter. Currin further testified that inside the office Bellerose told him that he did not want anyone harassing or coercing other employees. When Currin denied that he had harassed anyone, Bellerose stated, "I want it completely understood that there will [sic] be no harassment or coercing." (Tr. 259.) Currin told Bellerose that he understood, the two shook hands, and Currin left the office.

Bellerose testified that as he was returning to his office from a meeting down the hall from the cafeteria, he saw Currin through glass windows in the cafeteria door thrust the newsletter into the chest of another employee. (Tr. 655.) Because it appeared as though Currin was forcing the literature on the employee, Bellerose walked into the cafeteria and asked Currin to come to his office.[3] Bellerose denied that he ever told Currin that he could not distribute literature in the cafeteria. Rather, he stated that he told Currin that he did not want him forcing it on the other employees.

The testimony of both individuals is essentially the same, except that Bellerose denied that he told Currin that he could not distribute literature in the cafeteria and Currin denied that he was harassing and forcing the literature on another employee. Of the two, Currin's testimony was unconvincing on this point. It is implausible that Bellerose would tell Currin in public that he could not pass out literature, but never mentioned it again in private (out of earshot of everyone else). It is also difficult to believe that in a cafeteria where coworkers were present, not a single employee was called to corroborate Currin's version of the public conversation. In contrast, Bellerose's testimony is consistent with a memorandum that he posted immediately after the incident dispelling a rumor that an employee was fired for passing out union literature. (GC Exh. 5.) The memo explained that the employee had been counseled for pressing documents against the chest of another employee in the cafeteria and that such conduct was unacceptable. Bellerose's testimony is also consistent with what he had told other employees in various meetings that occurred around the same time, that is, that literature had to be handed out on break time in nonworking areas. (Tr. 61.) For these, and demeanor reasons, I credit

Bellerose's version of what he said to Currin on or about March 11, 1999.

2. Second-shift noncons employees are questioned about the Union

Arnold Gregory, Antonio Walton, and Antonio Williams are second-shift associates in the noncons department. Gregory testified that in mid-March 1999, he was working in the area immediately surrounding the noncons conveyor belt, when Supervisor Chuck Robinette walked over to Walton and Williams, who were working nearby, and asked them why they wanted a union. (Tr. 57.) When neither employee responded, Robinette walked away.

The next day, Gregory was working in a noncons aisle when Walton and coworker Clyde Smith beckoned him to come to the noncons desk to hear what Robinette was saying about the Union. According to Gregory, Robinette told a small group of employees that union dues would be $40 per week and that he could not understand why the employees wanted a union because K-Mart had been good to them. Gregory testified that Robinette also stated that if the Union was elected there would be a strike and everyone would lose their jobs. (Tr. 59, 90.)

Employee Walton likewise recalled Robinette saying that union dues would be $40 per week. He testified that Robinette asked the employees why they needed a union and told them that the Respondent would never sign a collective-bargaining agreement.[4] (Tr. 131, 132.) Employee Smith also testified that Robinette said that union dues would be $30 or $40 a week and remembered Robinette telling the employees that it would be a waste of time to vote for the Union. (Tr. 142.)

Robinette testified only long enough to generally deny that he ever initiated any discussion with the employees about the Union. He stated that twice he responded to questions asked by a group of employees, "but that was it." (Tr. 547.) He did not identify who were the employees and he did not specify when the two encounters occurred or where they occurred. He also denied that the Respondent instructed its supervisors to try to encourage the employees to vote no. (Tr. 548.) Having observed him testify, and having considered his responses, I am not persuaded by Robinette's generalized and very limited testimony.

The Respondent nevertheless asserts that there are inconsistencies and contradictions in the testimonies of Gregory, Walton, and Smith, and therefore their testimonies should not be credited. It is not uncommon, however, for one person to recall parts of a conversation and for another person to recall other parts. The fact that individual recollections do not overlap completely does not warrant an inference that the witnesses are not telling the truth. Here, the corroborative testimonies establish that Robinette did ask why employees wanted a union (Tr. 57, 59, 132); that he did tell the employees that union dues would be $40 a week (Tr. 59, 131, 141–142); and that he did state that employees would lose benefits if the Union was elected (Tr. 132, 142–143).

For these, and demeanor reasons, I credit the testimonies of Gregory, Walton, and Smith, and I find that Robinette was not credible on this point.

3. The mandatory March meeting

Sometime in mid-March 1999, a mandatory meeting of the shipping department and noncons associates was called by General Manager Bellerose. Shipping department employee Donald Beasley testified that Bellerose told everyone at the meeting that some employees had complained that they had been harassed by employees trying to organize the Union. Bellerose told the group

[3] Bellerose credibly testified that he chose to go to his office to discuss the matter because he did not want to embarrass Currin in front of his coworkers. (Tr. 656.)

[4] The evidence reflects that Walton may have melded the remarks made by Robinette on the 2 consecutive days.

that he would not tolerate harassment and if anyone felt that they were being harassed, they could notify him, their immediate supervisor, or the human resources department. Beasley also testified that Bellerose stated that union literature could not be handed out on companytime unless you were on your break in the breakroom. Employees Anthony Gregory and Gary Bush also attended the meeting.[5] They likewise recalled Bellerose saying that union literature could only be handed out during breaktime in nonworking areas (Tr. 61, 126, 300, 302) and that if anyone was harassed by another employee about the Union they should report it to Bellerose because he did not want anyone to be harassed.

When the meeting was over, Bellerose distributed a procompany memo to the employees, dated March 16, 1999, which, among other things, reiterated that the Respondent would not tolerate associates harassing other associates about the Union. (GC Exh. 4.) It also stated that "if you have any concerns about questionable conduct, feel free to talk to your supervisor, manager or myself at any time."

Bellerose admitted that he told the employees that harassment would not be tolerated, but denied telling them that they should report any harassment about the Union to him. (Tr. 653.) His testimony, however, is contradicted by his contemporaneous March 16 memo, which focuses solely on harassment by union supporters and encourages employees to contact their supervisor, manager, or him about such conduct. Bellerose also denied making any statements at the meeting about distributing union literature during working time. The credible and corroborative testimonies of employees Gregory, Beasley, and Bush, sufficiently rebut his denial. Thus, for these and for demeanor reasons, I do not credit Bellerose's denials about reporting employees who solicit support for the union and restricting the distribution of union literature on companytime.

D. Events of April 1999

1. Distributing union literature outside the main entrance

In early April, after the end of their shift, employees Neil Currin and Tom Hooks passed out copies of an organizing newsletter, called the Canton Ear, outside the main entrance to the Canton distribution center. (GC Exh. 6.) As they handed the literature to employees leaving and entering the building, Bellerose told them that he wanted to see them inside. Hooks and Currin testified that Bellerose took them into an office in the personnel area where he told them that they could not pass out literature outside of the building. When Hooks asked him if it was all right to distribute the literature during breaks and lunches in nonworking areas, Bellerose responded, "You're welcome to distribute it out at the gate," and he repeated that statement several times. (Tr. 184, 261.)

Bellerose admitted that he prohibited Currin and Hooks from distributing union literature at the entrance to the building. However, he testified that he told them that "it would be better for them to go out more towards the gate area." (Tr. 671.) The implication being that he did not insist or direct them to distribute the literature at the gate. Rather, he suggested that they could pass out their materials in the parking lot toward the gate. For demeanor reasons, I reject Bellerose's version of the conversation, as well as the inference that the Respondent would have me draw from his testimony. I find the testimonies of Currin and Hooks were credible and consistent.

2. The "birthday" party meeting

The Respondent typically holds birthday party meetings to recognize employees who celebrated a birthday during the previous month. Refreshments are served and employees are encouraged to ask questions about the Company. The unrebutted evidence shows that these informal monthly get-togethers are an opportunity for the employees to voice complaints.

In April 1999, a birthday party meeting was held to recognize the birthdays of employees Samuel Tocco and Faye Barbee. General Manager Bellerose attended, along with a human resources employee named "Cheryl, and Human Resources Manager Chris Head. Barbee testified that after finishing their cake, Bellerose asked if anyone had any questions or complaints. When there was no response, he stated "let's talk about the union." He wanted to know why the employees felt that they needed a union? Barbee testified that she told Bellerose that the employees looked to the union for "job security." At that point someone asked a question about the Toys R Us annex, a building located next to the warehouse facility, which was used to store noncons merchandise. Many of the noncons employees were upset because the Respondent was using an outside contractor to operate the Toys R Us annex, rather than assigning the work to noncons employees. Barbee testified that Bellerose stated that the Respondent "could not afford to send anyone from our Company" to work at the annex at the time. (Tr. 153.) He also stated that if the Union was elected the Respondent would work out of the warehouse only. (Tr. 152.)

Tocco testified that Bellerose asked the employees if they had any questions and told them to "feel free to talk." (Tr. 167.) He specifically asked Bellerose how long was the lease for the Toys R Us annex. According to Tocco, Bellerose thought that the lease might have a few years left, but he mentioned that the Respondent was considering purchasing the building depending on the outcome of the election. (Tr. 167.) Tocco also testified that Bellerose stated that the Respondent was considering purchasing the Canton warehouse depending on the outcome of the union election. (Tr. 168.) Tocco stated that Bellerose said that if the Union

[5] Gregory recalled another meeting in April held for noncons employees only, which was attended by Bellerose and Operations Manager David Creamer at which Bellerose reiterated that employees should report any harassment by union supporters. That prompted Gregory to ask what should he do if he felt harassed by LISI, an antiunion consulting firm hired by the Respondent. According to Gregory, Bellerose dismissed the question by saying that they were just giving information. Bellerose denied that he attended such a meeting. He testified that following the mid-March meetings described by Bush, Gregory, and Beesley he conducted no meetings with employees concerning the Union until early May 1999. (R. Br. p. 44.) The evidence shows, however, that Bellerose attended a birthday meeting in April. In addition, Creamer did not deny that he and Bellerose were present at a meeting for noncons employees in April. The failure of Creamer to testify on this issue warrants a reasonable inference that his testimony would have been adverse to the Respondent. *Jim Walter Resources,* 324 NLRB 1231, 1233 (1997). For these, and demeanor reasons, I credit the testimony of employee Anthony Gregory that Bellerose reiterated at a meeting in April that anyone who felt harassed by employees supporting the Union should advise management of the same.

was elected and it decided to go on strike, the Respondent would ship all of its merchandise from the annex. (Tr. 169.) Tocco opined that "he (Bellerose) was making it quite clear that they would ship from the annex if the union got in and there was a strike." (Tr. 175.) Tocco also stated that Bellerose said, "he would do whatever it took to keep the union out." (Tr. 168.)

Barbee and Tocco were credible witnesses. They did not contradict each other. Both testified that Bellerose stated that in the future the work possibilities for the Toys R Us annex depended on the outcome of the union election.

Bellerose did not rebut Barbee's testimony that he initiated a conversation about the Union by stating, "let's talk about the union." In addition, he did not specifically tell the employees that no one would be transferred to the annex if the Union was elected. Rather, he denied that he told the employees that they would not be transferred to the Toys R Us annex "because of their union activities," which is not exactly the same. (Tr. 664.) For these, and demeanor reasons, I credit the testimony of Barbee and Tocco as to what Bellerose stated at the birthday party meeting.

E. The Respondent's Antiunion Campaign

1. The Greensboro contract

Barbara Macer is a traffic clerical, who works a split shift 1–9 p.m. She actively supported the Union serving as the editor of the union newsletter and passing out union literature to coworkers. In early April, Macer saw shipping clerk Jackie Sinelli using the company photocopy machine in the front office to make copies of the "Greensboro" contract: a collective-bargaining agreement covering the Respondent's unionized warehouse employees in Greensboro, North Carolina.[6] Managers Clayton Schroeder, Bill Bumbalough, and Dave Creamer were in the general vicinity of the photocopying machine. According to Macer, Creamer stood 10–12 feet from Sinelli, as she made copies. Creamer testified that he did observe Sinelli make copies of the Greensboro contract on companytime and also stated that she was directed to do so by management. (Tr. 524.) Although he did not know how copies were made by Sinelli, he stated that he needed 12–15 copies for members of management. (Tr. 525.)

Ten minutes after Macer first saw Sinelli at the copy machine, she walked across the hall to tell Human Resources Manager Chris Head that Sinelli was making copies of the Greensboro contract on companytime using company materials. According to her unrebutted testimony, Head stated that he would look into the matter and Macer returned to work. However, later that afternoon, around 4 p.m., Macer saw Sinelli passing out copies of the Greensboro contract on companytime to employees in the front office, the cafeteria, the traffic office, and outside the locker room in the warehouse.

2. The "Vote No" T-shirts

In April, "Vote No T-shirts" were available in boxes located in the front office area for any employee who wanted one. Employee Anthony Gregory testified that around mid-April he saw shipping department employee Mike Sundberg with an armful of "Vote No" T-shirts distributing them to other employees, while Supervisors Jerry Walker and Bill Kaiser watched. According to Gregory's unrebutted testimony, he informed General Manager Bellerose that an employee was passing out "Vote No" T-shirts on companytime in the shipping department, and Bellerose told him he would look into it. Gregory further testified that shortly thereafter he saw Operations Manager Creamer passing out "Vote No" T-shirts to employees, including employees Vince Kutscheid and Mike Bowden. (Tr. 69–71.)

Operations Manager Dave Creamer testified that he had been instructed by Bellerose to retrieve some "Vote No" T-shirts from the warehouse, after an employee (presumably Gregory) complained to Bellerose that the T-shirts were being passed out in the warehouse on companytime. According to Creamer, the T-shirts were available to anyone who wanted them in the front office area, but were not suppose to be distributed on the work floor. Supervisor Walker misunderstood the instructions and had taken some "Vote No" T-shirts to his office. Creamer said that he retrieved the "Vote No" T-shirts from Walker's office and returned them to the front office area.

However, Creamer denied distributing the T-shirts to employees. Rather, he testified that as he walked back to the front office through the warehouse with the "Vote No" T-shirts someone took a T-shirt off the pile. (Tr. 519.) Creamer was a credible witness and his explanation is plausible. His testimony was also corroborated by employee Kutscheid, who testified that he never received a T-shirt from Creamer or anyone else. (Tr. 629.) I credit the testimony of both Creamer and Kutscheid as to whether they distributed or received T-shirts on working time in a working area.

On the other hand, the evidence corroborates Gregory's testimony to the extent that there were "Vote No" T-shirts in the warehouse in Walker's office. The unrebutted testimony also shows that Gregory complained to Bellerose about the "Vote No" T-shirts, which prompted Bellerose to direct Creamer to retrieve them. Although Creamer testified that he retrieved the T-shirts from Supervisor Walker's office before any were distributed, his testimony on this issue is hearsay and as such I give it little weight in absence of any corroborative testimony by Supervisor Walker, who was not called to testify at the hearing. The Respondent offered no explanation for not calling Walker. It is well settled that when a party fails to call a witness who may reasonably be assumed to render favorable testimony to that party, an adverse inference may be drawn regarding the factual issue on which the witness is likely to have knowledge. Indeed, it may be inferred from the failure to call that witness that the witness, if called, would have testified adversely to the party on that issue. *Jim Walter Resources,* 324 NLRB 1231, 1233 (1997). Such an adverse is warranted in this case.

Supervisor Kaiser similarly denied that he observed employee Sundberg distributing "Vote No" T-shirts. He credibly testified that he was on bereavement leave from April 29–May 9, and to the best of his knowledge the T-shirts were not available before then. For demeanor reasons, I credit his testimony that he did not observe Sundberg distributing T-shirts.

That does not mean, however, that employee Sundberg did not distribute the antiunion paraphernalia. Sundberg testified that he took 20–30 "Vote No" T-shirts from the front office area to the

[6] The wages and benefits of the Greensboro contract were lower than the wages and benefits of the Canton facility employees, a point highlighted by the Respondent in opposing the Union at Canton.

shipping department before bringing them home, but denied passing out any T-shirts to coworkers. (Tr. 522–623.) His testimony was not persuasive. Sundberg did not conceal the fact that he had a strong dislike for Gregory and the Union. His antipathy for the union supports a reasonable inference that he was more involved in the antiunion campaign then he was willing to admit. I am unconvinced that he took 20–30 "Vote No" T-shirts directly home without passing a few out to his coworkers. For these, and demeanor reasons, I credit Gregory's testimony that Sundberg distributed "Vote No" T-shirts in the warehouse during working time.

3. Continued distribution of antiunion paraphernalia

Gregory also credibly testified that around April 23, he saw Supervisors Walker and Kaiser handing out copies of the Greensboro contract to employee Mike Sundberg. (Tr. 65, 97.) He also saw Kaiser handing antiunion literature to employees Larry Nagy, Rodney King, and Jim Jones. (Tr. 69.) Kaiser did not dispute this part of Gregory's testimony, and Walker was not called to testify. His absence warrants an adverse inference that had he been called to testify he would have rendered unfavorable testimony to the Respondent on this issue.

Gregory further testified that the next day, April 24, he observed Supervisor Walker and Kaiser handing copies of the Greensboro contract to employee Mike Sundberg and later that evening Sundberg gave a copy of the contract to employee Rodney King. (Tr. 65–67, 98, 101.)

Gregory stated that Walker and Kaiser showed him a copy of the Greensboro contract and told him that it was the contract that they handed out. (Tr. 101.) Again Walker was not called to testify, which warrants an adverse inference.

Kaiser did not deny that he ever handed out the Greensboro contract to employees. Rather, he testified that he could not find anything indicating that he worked on Saturday, April 24. (Tr. 541.) He also testified that he researched various documents including a tracking report (R. Exh. 45), which shows that several employees did not work on April 24. However, Respondent's Exhibit 45 does not even list Gregory, Sundberg, King, or Kaiser as employees nor does not show that they worked any time during week of April 19–25. I find that the exhibit has no probative value because it does not even identify the key witnesses as employees. Also, for demeanor reasons, I am unpersuaded by Kaiser's testimony that no employees worked during on April 24.

Sundberg stated that he was never given copies of the Greensboro contract. (Tr. 622.) He also denied distributing any antiunion literature to any employees. For demeanor reasons, I do not credit this part of Sundberg's testimony. Instead, I credit Gregory's testimony that Walker, Kaiser, and Sundberg distributed copies of the Greensboro contract in the shipping area.

Employee Larry Nagy also observed Supervisors Walker, Kaiser, and Robinette distributing antiunion literature in the shipping area on companytime. Nagy's uncontradicted testimony shows that Walker gave him antiunion literature while he worked in a trailer on the dock. As he handed the material to Nagy, Walker stated that a "non-union family is a happy family or something to that effect." (Tr. 313.) Nagy also stated that Kaiser was in the area handing out the same literature. (Tr. 311, 312.) Kaiser, however, did not rebut Nagy's assertion.

Nagy further testified that 1 day on his way into work Walker asked him if he wanted a "Vote No" T-shirt to which Nagy responded "I wouldn't mind having one of those to wash my car with or check my oil." (Tr. 314.) Finally, Nagy stated that about 2–3 weeks before the election Supervisor Robinette handed him a "Vote No" button and "Vote No" K-Mart hat on companytime. Nagy's testimony on this point was also unrebutted.

Employee Ricky Brock testified that on May 6 he saw employee Doug Morse talking with Receiving Supervisor Arnie Vandercruyssen in a receiving aisle. Morse then got into a golf cart with Vandercruyssen and drove to the other end of the receiving aisles. Brock stated that along the way, the Vandercruyssen and Morse periodically stopped to talk to employees and Morris handed out "Vote No" buttons. Brock testified that he could not hear what Morse and Vandercruyssen said to the employees. He was working in another aisle several hundred feet away. (Tr. 290.) His primary attention was directed to moving a pallet of merchandise down an aisle, which ran parallel to the route taken by Vandercruyssen and Morse.

Vandercruyssen testified that during the organizing campaign antiunion literature and 'Vote No" buttons were passed out, "left on desks of employees to read and look at" and made available at the front door. (Tr. 645.) He denied, however, that he distributed Vote No buttons or that he distributed antiunion literature from a golf cart. Vandercruyssen did not recall seeing Doug Morse distribute Vote No buttons or recall riding in a golf cart with him. He did not know Ricky Brock. Vandercruyssen was no longer working for the Respondent when he testified at the hearing.

For demeanor, and other reasons, I credit Vandercruyssen's testimony that he did not see Morse distribute buttons to employees or participate in that activity with him. While it is possible that Brock may have seen someone with Morse, I am unconvinced that it was Vandercruyssen. Notably, Brock stated that he was not sure of Vandercruyssen's name, that he had never seen him in the area before, and that he had never seen him driving a golf cart before, which suggests that he may have identified the wrong person. That possibility is enhanced by Brock's questionable vantage point several hundred feet away and the fact that he was devoting most of his attention to negotiating the aisle with a pallet of merchandise.

Finally, Employee Tom Hooks testified that a few days before the election he was working by the receiving office when employee Bob Shaw handed him and other employees in the area a letter prepared by another employee, Sharon Dielenhein, praising the Respondent and opposing the Union. (GC Exh. 8.) Hooks stated that Shaw did not distribute the letter on his break.

F. Events of May 1999

1. The May 1 open house

In 1987, the Canton warehouse held an open house to commemorate the 25th anniversary of K-Mart. In spring 1998, almost a year before the Union filed its representation petition, the Respondent discussed the idea of having another open house for employees and their families. On April 7, 1998, Manager Bill Bumbalough issued a memo to the Canton facility employees soliciting their ideas, help, participation, and input for a 1998 open house. (R. Exh. 12.) An open house committee met in July

and October 1998 to develop a program and come up with an open house date.

In November 1998, Operations Manager David Creamer[7] was asked to coordinate the open house activities, including setting up a raffle. Creamer instructed the salvage room employees to store damaged merchandise, as well as items inadvertently shipped and unclaimed by various vendors, which would be used as raffle prizes.

By December 1998, the open house committee still had not selected a date for the open house. January was not an option because of the biannual inventory and February was ruled out because of possibility of inclement weather. In addition, renovation of the front offices and entrance began in November and was not expected to be completed for a few months. Thus, in December 1998, Bellerose issued a memo to the Canton facility employees indicating that the open house date would be delayed until the remodeling of the front offices was completed.[8]

In early April 1999, the front office remodeling was completed. A short time later, the open house was scheduled for Saturday, May 1, 1999. The open house committee met to organize the event and all of the warehouse employees were notified.

The May 1 open house was a big event, complete with a band, face painting, clowns, and fire trucks. Hot dogs, hamburgers, drinks, and T-shirts were provided at no charge. The Respondent raffled off Nintendo "64" sets, televisions, VCRs, boom boxes, and many other items. A grand prize raffle was held for a riding lawn mower.

2. Macer's unsuccessful job application

On or about April 22, the Respondent's corporate human resources director, William Gilooley, was in the process of interviewing candidates for a human resources generalist position at the Canton facility, when traffic clerk Barbara Macer asked him if he would consider an application from someone within the warehouse. Gilooley testified that he spoke to Macer about the qualifications for the position and encouraged her to apply if she thought she met the qualifications. About a week later, Macer submitted an application for the position. On or about April 29, however, another candidate was selected.

Macer testified that in late April she asked Bellerose if she could bring a guest to the open house because she did not have any family to bring. Initially, he told her, "No." (Tr. 211–212.) He then told her that she could bring a guest if she provided the guest's name by the end of the week. Macer asked why she was the only person being subjected to this arrangement. Bellerose replied that the Company wasted too much time on her issues and that she should turn in the name of her guest by week's end.

On or about May 4, a few days after the open house, Macer had another conversation with Gilooley. She testified that she asked Gilooley about the status of her application, he took her into an office, asked her if she had brought a union organizer to the open house, and told her that the Respondent had to take into consideration who were Macer's friends. (Tr. 216.) Macer testified that Gilooley told her that she had used poor judgment in bringing a union organizer to the May 1 open house.

Gilooley denied having more than one conversation with Macer about the job opening. (Tr. 390.) Rather, he stated that after May 1, Macer approached him because she was concerned about how managers were treating her because she brought a union organizer to the open house. (Tr. 391, 393–394.) Gilooley could not recall many details of their second conversation. His testimony was very general and very unconvincing. Macer's testimony, on the other hand, was concise and credible. For these, and demeanor reasons, I credit her account of what was discussed during both conversations.

3. The May 4–5 captive audience speeches

On May 4–5, Senior Vice President of Logistics James Mixon addressed groups of employees on different shifts concerning the Respondent's position with respect to the Union.

The credible evidence establishes that Mixon read from a prepared text (R. Exh. 44) covering many topics. Mixon told the employees that with respect to the Toys R Us annex that:

> The Respondent was looking at staffing needs in Canton to make sure we have the staffing in place for our peak fall season to handle our main facility and when that is accomplished, we intend to staff the Toys R Us annex with associates from this facility.

He asserted that in connection with the alternative pay plan that was implemented the previous year:

> We decided we could get the cost savings we needed without putting our Union-free advantage at risk by installing an alternative pay plan for new associates which would still be wage competitive in the local market. While that decision was understandably unpopular, it was based on economic necessities; and we are not going to change it or reverse it because of a Union. They can tell you otherwise, but it's not the Union's decision to make.

Regarding the Respondent's unionized distribution center at Greensboro, North Carolina, Mixon stated:

> We have only one Hardline Distribution Center under a union contract—and that's Greensboro. As I believe you know, it took three years to get a contract down there, and what did they end up with? Less than the wages of our Canton associates—in most cases much, much less. Your wages are much higher, about $6 an hour more than at Greensboro. Even new associates on the alternative pay plan will earn more over the first five years of employment at Canton than unionized associates at Greensboro. And you have better benefits—including your bank of hours. Of course, you also don't have to worry about being forced to pay mandatory union dues or be fired.
>
> Please understand that if you bring the union in here, the situation changes dramatically. It's a whole new ball game—played under a whole new set of rules. There would be very different business consideration on the table. First of

[7] The evidence shows that the Respondent has historically held a summer picnic and Christmas party for employees and their families. Creamer was chosen to coordinate the open house because he had organized the 1998 summer picnic.

[8] In October 1998, Senior Vice President Jim Mixon initiated a general maintenance program in all the distribution centers. Bellerose contracted to have the front offices and bathroom remodeled and to have some landscaping done outside.

all, one of the business reasons to maintain premium pay at Canton is history. The effect on our Union-free status would no longer be a factor in our decision-making.

Second, a union almost always means higher costs—totally unrelated to wages and benefits. In a union shop, you lose the flexibility to respond to needs and market conditions in a timely way. A loss of flexibility means lower efficiency and higher operating costs. A union by it is very nature is divisive and creates a hostile working environment. It builds barriers between us and destroys teamwork—teamwork that is essential to being successful in today's competitive market. Efficiency falls, productivity goes down, and costs go up.

We have seen this in Greensboro. Our efficiency is down to an unacceptable level. Greensboro, quite frankly, is becoming a liability to our Company. As I see it, there are three ways to deal with the problems at Greensboro. First, they could take some major self-help measures to try to turn that operation around. Frankly, I'm not optimistic at this point that they will be able to do that.

A second alternative would be for the Company to further reduce the costs of wages and benefits in the upcoming negotiations. The first contract took three years to get—this time around, it could be tougher and more painful for everyone involved.

A third possibility is to outsource that work or consolidate Greensboro's work with other distribution centers. As distasteful as that is, I have a responsibility to the Company to make sure we keep all of our options open.

After describing the Greensboro experience and what he anticipated might happen at that unionized distribution center, Mixon told the Canton employees what they could expect if the Union was elected.

Now, what would happen here if the Union gets in? What can you expect? if we have to deal with this Union here at the Canton DC? I want to spell it out as plain as I can. I don't want there to be any surprises six months or a year from now. You have a right to know what to expect before you vote next week. As I'm sure your management here has told you, bargaining is a very risky and uncertain process. There are no guaranteed results, and nobody can tell you with absolute certainly what the outcome would be.

But I can tell you this, if we have to deal with this Union here at Canton, it will not be on friendly terms. No matter what they say, we are not going to make this Union a partner at the bargaining table. They can ask for anything they want. We will listen, and we will certainly bargain in good faith. We will bargain hard, and we will bargain tough. And we will bargain from a position of strength. We will get the best possible deal for the Company, or there won't be any deal at all—no matter how long it takes. All negotiations will be based on business considerations—not what the Union wants.

This Union has *never* negotiated a final deal with me. We will be prepared to do whatever it takes to protect this Company. And that means we will carefully consider how bargaining here at Canton could affect our other distribution centers. We do not want any more distribution centers unionized. It jeopardizes our ability to put merchandise in our stores in a reliable fashion. If our logistics network becomes unreliable, our business is at risk, and we must explore other options. So that has to be a consideration if we have to deal with the Union here at Canton. Also, we have to consider how it could affect negotiations at our unionized DC's. If the Union comes in, we will have no choice but to take a hard look at whether this DC should be treated any differently than our other unionized DC's. That's not personal, and it is not intended as a threat. That's business. That's an economic reality.

Looking at the big picture, why should Canton, if it goes Union, have a better deal than Greensboro or our softline DC's?

Now the Union may tell you that they can force us to give in to what they want by threatening us with a strike or boycott. I sure hope it doesn't come to that. A strike would hurt our Company, and it would hurt you. A boycott of our stores—if successful, could severely harm our business and cause mass layoffs. That's not a pleasant thought. But we are not going to run from a strike or be intimidated by the threat of a boycott.

We didn't at Greensboro and we wouldn't here! If it comes to a strike, a boycott, or any Union disruption, we will deal with it. We will take whatever steps are necessary to protect our business. We have an obligation to our customers, we have an obligation to our associates, and we have an obligation to those of you who would cross the picket line or refuse to support a boycott—and we will meet those obligations. [R. Exh. 44.]

Mixon concluded each presentation by urging the employees to vote against the Union and by praising Bellerose for implementing necessary changes at the Canton facility. He did not take any questions during his speech, but said he was willing to talk to anyone afterwards. No one else spoke at these sessions.

4. The May 11 pay increase

In 1997, the Respondent implemented a new wage review process whereby a wage survey was conducted during February–March, the results of which were complied and submitted to the compensation department for review. The compensation department evaluated the data collected and made a recommendation to the senior vice president of logistics (i.e., Jim Mixon) regarding wage increases for the distribution center employees. The senior vice president of logistics determined the amount of the wage increase based on the Respondent's overall financial performance, overall performance of the logistics operation, and the recommendation of the compensation department. the vice president of human resources prepared a presentation for all the general managers to follow in announcing and explaining the wage increase. The wage increase was announced to the warehouse employees at shift meetings using the presentation package prepared by the human resources vice president and the wage increase becomes effective on or about June 1.

The same process was followed by the Respondent in 1998, except that a new pay plan was initiated along with the wage increase.

In 1999, the process of collecting data and making a recommendation remained basically unchanged and eventually Senior Vice President of Logistic Mixon determined that there would be a 50-cent-wage increase for most nonunionized distribution center employees. Human Resources Vice President Gilooley prepared and distributed a formal presentation package to all nonunion distribution center general managers, which explained the amount of the wage increase and who was eligible to receive it.

On May 11, less than 2 days before the union election, an afternoon telephone conference call took place between corporate officials Mixon, Gilooley, and David Lanni, and all of the general managers in the nonunionized distribution centers. At the Canton facility, Bellerose, Assistant General Manager Mike Tripp, and Human Resources Manager Chris Head participated in the telephone conference call. The formal presentation packet was reviewed by phone and Mixon instructed the general managers to schedule meetings explaining the wage increase as soon as possible. No specified date or timeframe was established for announcing the wage increase. Rather, the general managers had the discretion to schedule the meetings for their individual facilities. (Tr. 459.) As Operations Manager Mike Tripp testified the general instructions were given to communicate the wage increase to the employees "as soon as you could schedule it, you know, depending on work schedules." (Tr. 593–594.) The phone call ended after 3 p.m. in the late afternoon.

Responding to Mixon's instructions, Bellerose determined that the earliest the Canton facility could discuss the wage increase with the employees was the following week. (Tr. 685.) He testified that he made that determination because the union election was scheduled to begin at 10:30 a.m., May 13, and he did not want to hold the employee meetings in violation of the "24-hour" rule. (Tr. 686.) However, Bellerose testified that he was concerned that if the Respondent waited until the following week to tell the employees that they were going to receive a wage increase, they might find out that all of the other distribution centers had gotten a pay raise, and believe that they were being singled out because of the union election. (Tr. 688.) With that in mind, Bellerose, Tripp, and the Respondent's management consultants prepared and posted a memo in the late evening of May 11. The memo announced that all eligible employees would receive a pay increase effective May 31, 1999, and provided a general summary of the pay raise. (GC Exh. 9.) It also stated that NLRB rules prevented the Respondent from holding group meetings to explain the wage increase until after the union election.

On May 12, around 10 a.m., the Respondent began holding a series of 25th–hour mass employee meetings on each shift. Each meeting began with a brief introduction by Bellerose. Employee Donald Charbonneau credibly testified that at his shift meeting, Bellerose stated that "this was the final meeting that we would have as a group together and that he was going to take this opportunity to announce a general wage increase." (Tr. 275.) He then introduced Assistant General Manager Mike Tripp, who delivered the 25th–hour speech.

Standing at an elevated podium, which displayed a "Vote No" banner, Tripp read from a prepared text, and talked about the progress being made at the Canton facility. Eventually he had this to say about Mixon's assertions that the Respondent would not to cut employees' pay:

> Some others of you indicated you supported the union or were uncertain about how to vote because you didn't have anything in writing to the effect that Kmart does not have any plans to cut your pay. Some have said that if you received such a statement it would give you confidence in Kmart. In fact, several of you made that comment to Jim Mixon when he was here last week.
>
> Well, Bill and I listen. You've challenged us to put that in writing. We accept the challenge.
>
> I have a letter here from Jim Mixon, our Senior Vice President, that is a sign of our commitment to you (SHOW LETTER). I want to read just a part of this letter to you.

According to Charbonneau, Tripp then read a part of Mixon's letter, which stated that the Respondent had no intention of cutting employees' wages. Tripp continued by stating:

> But actions are more important. I have seen union handouts saying Kmart has announced plans to cut the bank of hours, and even that Kmart will cut associate pay. These union statements are simply false. Just this afternoon/yesterday, the Kmart Distribution Network announced a General Wage Increase for associates throughout the Network. For most associates here that means an increase of 50 cents an hour. That adds up to over $1000 a year at straight time. I don't believe a company with so-called plans to cut things-as the union has claimed-would do this.
>
> While not tied in any way to this election, the announced increase goes to the heart of demonstrating that the union has been absolutely wrong about what it tell associates in its attempt to get your vote. Don't fall for it. Remember the reality of collective bargaining. [R. Exh. 47.]

When Tripp finished his speech, copies of Mixon's letter, dated May 12, 1999, were given to the employees. Wages were the basic focus of the letter. The Mixon letter emphasized that the Respondent had no plan to reduce any associate's pay and that Mixon was willing to put that in writing. In the next to the last paragraph, Mixon also stated:

> I hope this signed letter puts this issue to rest. If it doesn't, then Kmart's history of providing pay increases to take effect each June 1st—including this year—should speak for itself. [GC Exh. 10.]

Voting began at 10:30 a.m., Thursday, May 13, and concluded at noon on Saturday, May 15. The Union was not successful.

The following week mandatory employee meetings took place for the formal presentation of the wage increase. Several groups ranging in size from 15–20 employees to 80–90 employees met in multiple meetings. (Tr. 614.)

III. ANALYSIS AND FINDINGS

A. The Alleged Overly Broad No-Solicitation Rule

The complaint alleges in paragraph 14 that at least since January 1999, the Respondent has maintained an overly broad no-solicitation and no-distribution rule which states:

> Associates of the Company are not permitted to solicit other associates for funds, contributions, memberships or other purposes during the associate's working time or at any

other time if such solicitation interferes with other associates who are on working time.

In addition, distribution of literature or documents of any kind is not permitted in work areas of the Company at any time, nor on any Company bulletin board. Any soliciting must be pre-approved by the Human Resources Department. This policy does not apply to Company-sponsored solicitations or distributions, such as Good News Committee fundraisers, United Way, March of Dimes, etc. GC Exh. 3.]

At the hearing, the General Counsel submitted, without objection, General Counsel's Exhibit 3 into evidence, which is comprised of a handbook, cover page, and one other page containing the above-quoted provision. There was no supporting witness for the exhibit nor did the General Counsel elicit any testimony from any witness showing that the employee handbook had been used by the Respondent before, during, or after the union organizing campaign. There is no evidence that employee handbook was distributed or made available to the Canton employees at any time or that the no-solicitation rule was posted or published by the Respondent at the Canton facility at any time. Finally, there is no evidence that the Respondent sought to enforce, referred or relied on the written no-solicitation provision at any time relevant to this case.

Because the General Counsel has failed to establish when and where the subject employee handbook provision was promulgated and maintained or that the policy was in effect at the Canton distribution center at the time of the union organizing campaign, the General Counsel has failed to show that the Respondent promulgated, maintained, and enforced a written broad no-solicitation and no-distribution rule which was unlawful on its face.

Accordingly, I shall recommend the dismissal of paragraph 14 of the complaint.

B. Bill Bellerose's Conduct

1. The alleged prohibition against distributing prounion literature in the cafeteria

Paragraph 7(a) of the complaint alleges that on March 11, 1999, Bellerose disparately enforced the Respondent's no-solicitation rule by unlawfully prohibiting employee Neil Currin from distributing prounion literature in the cafeteria. Bellerose denied that he told Currin that he could not distribute prounion literature in the cafeteria. For the reasons stated above, I credited Bellerose's testimony on this point. Accordingly, I shall recommend that the allegations of this subparagraph of the complaint be dismissed.

2. The alleged prohibition against discussing union-related subjects during working time

Paragraph 7(b)(1) of the complaint alleges that on March 16, 1999, the Respondent orally prohibited employees from discussing union-related subjects during their working time while permitting employees to discuss other subjects during this time. It is difficult to ascertain the underlying factual basis for this allegation. The General Counsel does not specifically address the issue in her brief. (See GC Br. at 20.)

Presumably Bellerose issued the directive in a mandatory meeting on March 16. Employees Gregory, Bush, and Beasley testified about the March 16 meeting. None of them stated that Bellerose told them that they were prohibited from discussing union-related subjects during working time or made any similar statements to that effect. Rather, they uniformly testified that Bellerose stated that some employees had complained about being harassed by other employees trying to organize the Union and that he would not tolerate the harassment. I find that Bellerose's statement falls short of establishing a rule prohibiting employees from discussing union-related subjects during their working time.

Accordingly, I shall recommend the dismissal of paragraph 7(b)(1) of the complaint.

3. The unlawful request to report harassment or pressure to support the Union

Paragraphs 7(b)(2), (c)(2), and (d)(1) allege that at various times in March and April 1999, Bellerose unlawfully told employees, by memo and orally, to report to Respondent any one who harassed or pressured them to support the Union. The credible testimony shows that in the mandatory March 16 meeting Bellerose told the employees that if anyone felt that they were being harassed about supporting the Union, they could notify him, their immediate supervisor, or the human resources department. Bellerose issued a followup letter, dated March 16, 1999, which, among other things, stated:

> *Comment*: Some of you have told me that the union and some of your fellow associates are pressuring you to sign up for the union.
>
> *Response*: As I have stated in the past, I will not tolerate any disrespectful behavior towards anyone. All associates need to know that.
>
> 1. You do not have to talk to a representative of the union if you do no want to.
> 2. You can say you are not interested and have that right respected.
> 3. You have the right not to rush into a decision without understanding all the facts.
>
> If you have any concerns about questionable conduct, feel free to talk to your supervisor, manager or myself at any time. [GC Exh. 4.]

The statement in the memorandum corroborates the employees' testimonies that Bellerose's verbally solicited employees to report to management any perceived acts of harassment or pressure by union supporters. The Board has held that an employer violates the Act by inviting its employees to report instances of fellow employees' bothering, pressuring, abusing, or harassing them with union solicitations. The implication being that the employer will take steps to stop union activity, including lawful activity like soliciting a coworker to sign a union authorization card. *Nashville Plastic Products*, 313 NLRB 462 (1993); see also *Frazier Industrial Co.*, 328 NLRB 717, 720 (1999), and cases cites therein. I find that Bellerose's solicitation tended to restrain union supporters from attempting to persuade other employees to support the Union for fear of being reported to management.

Accordingly, I find that the Respondent unlawfully violated Section 8(a)(1) of the Act as alleged in paragraph 7(b)(2) of the complaint.

4. The alleged disparately enforced solicitation/distribution rule

Paragraph 7(c)(1) of the complaint alleges that the Respondent disparately enforced its no-solicitation/no-distribution rule by restricting the distribution of union literature to nonworking time in nonworking areas, while allowing other forms of literature to be distributed in work areas during worktime. As shown above, the Respondent articulated a rule that union literature could be distributed only during nonworking time in nonworking areas. I find that the oral rule is presumptively valid. *Hale Nani Rehabilitation*, 326 NLRB 335, 335–336 (1998).

Notwithstanding the rule, the credible evidence shows that antiunion literature and paraphernalia were distributed in working areas during working time by employees who opposed the union. Jackie Sinelli made copies of the Greensboro contract on companytime in accordance with management's instructions. Operations Manager Creamer testified that he told Sinelli to make a sufficient number of copies for the supervisors and managers. The evidence shows that Sinelli distributed the Greensboro contract on companytime to employees in the front office, cafeteria, traffic office, and outside the warehouse locker room. However, there is no evidence that the distribution of the materials by Sinelli was initiated, solicited, known, or condoned by the Respondent. In other words, the evidence does not show that the Respondent encouraged or condoned employees who opposed the union to violate the no-solicitation rule. To the contrary, the credible evidence reflects that on at least two occasions Supervisors Cuppen and Rons told employees that they were not permitted to distribute antiunion literature during working hours.

The credible evidence also shows that employee Sundberg distributed "Vote No" T-shirts during working time in a work area. Again, however, there is no evidence that the Respondent initiated, solicited, knew of or condoned the distribution of T-shirts by Sundberg. Rather, Creamer credibly testified that the "Vote No" T-shirts were not to be brought into the working area of the warehouse and that when Bellerose told him that someone was distributing the T-shirts in the working area, he promptly confiscated the T-shirts and returned them to the entrance area.

Also, the evidence does not reflect that during the union organizing campaign employees were allowed to sell merchandise or otherwise solicit during working hours in working areas. Although Barbara Macer credibly testified that she saw Michelle Priestly, Chris Albany, and Joe Pryzybyla selling merchandise during working hours in working areas, she did not specify when this took place. Shipping Manager Joseph Pryzybyla credibly testified that the practice described by Macer was changed by Dave Vogel, who was general manager from 1996–1998. According to Pryzybyla, Vogel prohibited solicitation except during nonworking time in nonworking areas. (Tr. 633.) Pryzybyla stated that the current policy is the same, that is, solicitation is permitted only during nonworking time in non-working areas. Employees Gregory, Bush, and Beasley testified that they were told by the current General Manager Bellerose at various meetings that union literature could be distributed only during nonworking time in nonworking areas, which corroborates Pryzybyla's testimony. (Tr. 61, 126, 300, 302.)

The only other person Macer could remember who sold merchandise was Dennis Olmstead, but her best recollection was that she last bought something from him around Easter of 1998. (Tr. 209.) Moreover, Macer never testified that the solicitation she described occurred during the union organizing campaign. Thus, based on Pryzybyla's credible testimony, the evidence supports a reasonable inference that the solicitation took place before Dave Vogel became general manager or without his knowledge.

On the other hand, the evidence discloses that Supervisors Walker and Kaiser handed out copies of the Greensboro contract in the shipping area and also distributed antiunion paraphernalia. The unrebutted evidence discloses that Supervisor Walker handed employee Nagy antiunion literature on the receiving dock and told him that a "non-union family is a happy family." The unrebutted testimony shows that Supervisor Robinette handed Nagy a "Vote No" button and "Vote No" Kmart hat on companytime. Robinette testified that these items were placed on desks in the warehouse for employees to review and help themselves. There is also evidence that Supervisor Walker distributed "Vote No" T-shirts inside the warehouse.

The Board and the courts have held that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in antiunion solicitation during working time and in working areas does not automatically constitute an unfair labor practice. *Hale Nani Rehabilitation*, supra at 337. Rather, the question must be answered in the circumstances of the individual case with attention to whether "the no-solicitation rules 'truly diminished the ability of the labor organizations involved to carry their messages to the employees'—a consideration that would be "highly relevant" in determining whether an otherwise valid rule has been fairly applied.' *Hale Nani* citing *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 364 (1958), Analyzing the facts of the instant case within this analytical framework, there is no evidence showing that the inability of union supporters to distribute union literature during working time in working areas, even though the Respondent's supervisors were allowed to do so, significantly reduced the Union's ability to get its message to the employees. There is no evidence showing that the Respondent's enforcement of the rule created any considerable degree of imbalance in the relative abilities of the Union and Respondent to communicate with the employees.

In sum, the evidence falls short of showing that the Respondent encouraged, supported, or condoned employees who opposed the Union to violate the no-solicitation rule. Nor does the evidence show that the Respondent significantly reduced the Union's ability to get its message to the employees by restricting union solicitation to nonworking time in nonworking area, while imposing no such restriction on supervisors distributing antiunion literature and paraphernalia.

Accordingly, I shall recommend the dismissal of paragraph 7(c)(1) of the complaint.

5. Unlawfully prohibiting the distribution of prounion literature outside the warehouse entrance

Paragraph 7(d)(2) of the complaint essentially alleges that in early April 1999 Bellerose unlawfully prohibited employees Neil

Currin and Tom Hooks from passing out copies of an organizing newsletter, called the Canton Ear, outside the main entrance to the warehouse during nonworking time. Both employees credibly testified that Bellerose asked them to come to a human resources office where he told them they could not pass out union literature at the entrance to the building, but they were "welcome to distribute it out at the gate." (Tr. 184, 261.) The undisputed evidence shows that the two employees were distributing the prounion material during nonworking time in a nonworking area, which they pointed out to Bellerose.

The Respondent argues that Bellerose's conduct was reasonable and lawful because of the "seriousness of the safety concern involved and the relatively minor inconvenience that Currin and Hooks were asked to undergo." Respondent's Brief at page 59. Bellerose testified that he thought this was the "advisable thing to do" because Currin and Hooks were handbilling during a shift change in a "highly congested area" where there are people coming and going and truck traffic moving back and forth. (Tr. 671.) I am unconvinced that Currin and Hooks presented a safety concern, let alone a "serious" safety concern, at the location from which they handbilled. There is no evidence that they were obstructing the flow of traffic or people walking to and from work. Bellerose conceded that traffic was not affected. Rather, a review of the evidence reveals that Currin and Hooks were standing about four feet off the curb in a cross walk in an area inset (or protected) from a traffic lane with a reasonable amount of distance between their location and the door to the building. (See R. Exhs. 31 and 33.)

In addition, there is no evidence that Bellerose told Currin and Hooks that they presented a safety concern at the time of the occurrence. If their presence outside the entrance legitimately posed a safety concern one would have expected Bellerose to explain that to them, rather than repeatedly telling them they should handbill at the gate. Absent evidence that Bellerose explained to the employees that where they stood while handbilling presented a safety concern supports a reasonable inference that the safety issue is a post hoc rationalization.

Further, the evidence does not show, as the Respondent argues, that handbilling at the gate is equally as effective as handbilling at the entrance to the warehouse. It is difficult to believe that attempting to hand a piece of paper to an employee in a moving car leaving or entering the Respondent's parking lot is as easy or effective in getting the Union's message out as attempting to hand a piece of paper to an employee walking in or out of a building.

Accordingly, I find that Bellerose unlawfully prohibited union supporters Currin and Hooks from distributing prounion literature at the entrance to the warehouse building during nonworktime in violation of Section 8(a)(1) of the Act as alleged in paragraph 7(d)(2) of the complaint.

6. The unlawful statements made during the birthday party meeting

Paragraphs 7(d)(3)–(5) focus on Bellerose's conduct at the April 5, 1999 birthday party meeting. The credible evidence shows that Bellerose asked the employees at the meeting why they wanted a union; told them that the Respondent was considering purchasing the annex building depending on the outcome of the election; and stated that if the Union was elected and if it decided to go on strike, the Respondent would ship its merchandise from the annex building. It is alleged that Bellerose coercively interrogated the employees at the party and threatened that the Toys R Us annex work would be permanently outsourced if the Union were elected.

Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates the Act, the Board looks at whether under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 186–187 (1992). Among the factors to be considered in analyzing the alleged interrogation are whether there is a history of employer hostility or discrimination against union supporters; the nature of the information sought; the identity of the questioner; the place and method of the interrogation; and whether the statement was made in a context free of other unfair labor practices. See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Bellerose is the general manager of the Canton facility: the highest management official. His statements and conduct therefore are prone to have a significant effect on rank-and-file employees. The unrebutted evidence shows that after Bellerose solicited questions from the group and got no response, he asked directly why they wanted a union. Even though the question was posed in an informal setting, the initial lack of response supports a reasonable inference that the employees were uncomfortable discussing their union sympathies with the general manager.

The evidence also shows that during the same conversation Bellerose implicitly threatened the employees. In the course of answering questions, he implied that whether the noncons employees were transferred to the Toys R Us annex in the future, depended on the outcome of the election. I find that Bellerose's comments were unlawful and constituted an implied threat.

The evidence also shows that other unfair labor practices had been committed by Bellerose around the same time. For example, he violated the Act by soliciting employees to contact management if they believed they were being pressured or harassed by union supporters. He also unlawfully prohibited Currin and Hooks from distributing the union newsletter outside the entrance to the warehouse building. Thus, under all of the circumstances, I find that Bellerose's questioning of the employees during the birthday party meeting was coercive and that he implicitly threatened them during the course of the conversation.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating and threatening the employees as alleged in paragraphs 7(d)(3) and (4) of the complaint.

Paragraph 7(d)(5) of the complaint alleges that during the birthday party meeting Bellerose threatened that a strike was inevitable if the employees elected the Union. The evidence, however, does not directly or indirectly support a violation of the Act as alleged in paragraph 7(d)(5) of the complaint. Specifically, there is no evidence that Bellerose told the employees that a strike was inevitable if the Union was elected. Rather, he stated that if the Union was elected and if the Union went out on strike, the Respondent would ship its merchandise from annex building.

Accordingly, I shall recommend the dismissal of paragraph 7(d)(5) of the complaint.

C. Unlawful Conduct Attributed to Chuck Robinette

Paragraph 8(a) alleges that on March 15, 1999, Supervisor Chuck Robinette coercively interrogated employees Antonio Walton and Antonio Williams by asking them why they supported the Union. The credible evidence shows that Robinette was passing out antiunion literature, when he approached the two employees, who were working in a noncons aisle. (Tr. 134.) Neither employee responded to Robinette's question. Robinette walked away.

Although Robinette stated that every employee in his department supported the Union, there is no evidence to support that assertion and there certainly is no evidence showing that Walton and Williams were open and active supporters of the Union. Rather, Walton specifically testified that he was not active in the union drive. On the other hand, there is no evidence that Robinette took or threatened any adverse action against the two employees for not answering the question or because he assumed that they supported the Union. Also, the nature of the question was general and nonthreatening. It was asked in an open work area and there was no followup question or comment when the employees declined to answer. Under these circumstances, I find that the March 15 inquiry was not coercive. *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985). Accordingly, I shall recommend the dismissal of the allegations in paragraph 8(a) of the complaint.

Paragraphs 8(b)(1) and (3) of the complaint allege that on March 16, the very next day, Supervisor Robinette asked a group of noncons employees, including Williams and Walton, why they wanted a union.[9] The credible evidence shows that Robinette stated that joining a union was not a good choice, that it would be a waste of time to elect a union because the Respondent would not sign a collective-bargaining agreement, and that he intimated that if the Union was elected the employees would lose benefits. (Tr. 132, 142–143.) Thus, the evidence shows that Robinette's inquiry was linked to an implied threat and the assertion that it would be futile to elect the Union. I therefore find that the March 16 inquiry was coercive and that the employees were told that it would be futile to elect the Union. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 8(b)(1) and (3) of the complaint.

On the other hand, there is no evidence, nor does the General Counsel argue on brief, that Robinette told the employees on March 16 that the Respondent would close the Canton warehouse if the Union were elected. Accordingly, I shall recommend the dismissal of paragraph 8(b)(2) of the complaint.

D. The Alleged Unlawful May 1 Open House

The General Counsel argues that the May 1 open house was unlawfully conducted in a manner to affect the results of the election. It is asserted that the quantity and quality of the prizes, amenities, and food, as well as the timing of the open house was intended to influence employees to vote against the Union. In *Hovey Electric, Inc.,* 328 NLRB 374 (1999*),* the Board reiterated that in determining whether a preelection grant of benefits would improperly tend to influence the outcome of an election, the following must be examined: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit.

The evidence shows that the Respondent has a history of holding Christmas parties and annual picnics during which food, drink, games, and prizes are provided at no cost to the employees. Operation Manager Creamer credibly testified that the prizes for the annual picnic and the May 1 open house were collected from damaged items and merchandise abandoned by vendors. There was a grand prize raffle at both the 1998 summer picnic and the May 1 open house. An RCA satellite system was raffled-off at the picnic and a lawn tractor was given away at the open house. The unrebutted testimony of Creamer shows that lawn tractor was constructed from five or six damaged tractors that were in storage at an offsite warehouse. (Tr. 512.) In addition, the evidence shows that the same caterer was used for the 1998 picnic and the May 1 open house. Thus, the open house and the 1998 annual picnic were similar in many respects.

The General Counsel nevertheless asserts that the Respondent's hospitality for the May 1 event eclipsed that provided for other events. However, there is little, if any, evidence quantifying with specificity how much more, if any, was done for the May 1 open house. A comparison of Respondent's Exhibits 29 and 19 reflects that there were approximately 54 prizes raffled off at the 1998 picnic versus approximately 66 prizes for the May 1 open house. There is no evidence that the cost of the May 1 open house exceeded the cost of the 1998 picnic or any other employee social event sponsored by the Respondent. Considering the fact that there are approximately 634 employees at the Canton warehouse and that at one point it was projected that 3600 people (600 employees times 6 people per family) might attend the open house, the number of prizes raffled off is not disproportionate to the number of employees and their families that was expected to attend.

The General Counsel also argues that the timing of the May 1 open house shows that it was meant to affect the results of the election. It is asserted that although the open house had been a topic of discussion since April 1998, no real or meaningful action was taken with respect to scheduling a date for the open house, until after the Union filed its representation petition. The countervailing evidence shows, however, that the open house committee, which met in October to November 1998, considered and rejected the possibility of having the open house in January and February 1999 for legitimate reasons. The evidence shows that the open house was also delayed because of the remodeling of the front entrance. However, immediately upon completion of the remodeling work in early April 1999, the open house committee was convened and a date of May 1 was announced. Thus, the credible evidence reflects that the open house was delayed for legitimate reasons and was not timed to affect the outcome of the election.

Finally, the countervailing evidence shows that employee attendance at the open house was voluntary, that there was no electioneering on May 1, that the open house was held almost 2

[9] Contrary to the Respondent's assertions, there is no credible evidence that the group was comprised of open and active union supporters.

weeks before the union election, and that all employees were eligible to participate in the raffles. In particular, there is no evidence that the raffles were used as a means to determine who supported the Union or how they would vote in the election.

Accordingly, under all of the circumstances, I shall recommend the dismissal of the allegations in paragraph 9 of the complaint that the Respondent granted employees benefits vis-à-vis the May 1 open house in order to discourage employee support for the Union.

E. Unlawful Conduct Attributed to William Gilooley

Paragraphs 10(a) and (b) of the complaint allege that on or about May 4, William Gilooley questioned Macer's loyalty to Respondent and impliedly threatened her with adverse action because she had engaged in activities in support of the Union.

For reasons stated above, I have credited Macer's testimony that she twice spoke with Gilooley about the human resources position (once before and once after May 1) and that in the second conversation on or about May 4, he told her that she had used poor judgment by bringing a union organizer to the open house and that the Respondent had to take that into consideration in determining who was selected for the job. (Tr. 216–217.) Even though the evidence establishes that the successful candidate was actually selected for the position prior to May 1, and therefore Macer's "selection of friends" was not a factor in considering her for the job, the credible evidence supports a reasonable inference that Gilooley's assertion was calculated to leave the impression that Macer's support for the Union was a consideration. Thus, I find that Gilooley's statements reasonably tend to interfere with Macer's Section 7 rights by implying that her support for the Union was viewed as being disloyal to the Respondent and resulted in an adverse employment decision.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 10(a) and (b) of the complaint.

F. Unlawful Statements by James Mixon

Paragraphs 11(a), (b), and (c) of the complaint concern the remarks made by Senior Vice President James Mixon to the employees on May 4 and 5. Ample credible evidence shows that Mixon spoke from a prepared text. (R. Exh. 44.) Other witnesses testified about what they heard Mixon say, but their testimonies do not corroborate each other. To a great extent, the sum and substance of their testimony reflects each employee's interpretation of the what said as opposed to what was actually said. I therefore rely on the prepared text as an accurate reflection of the statements made by Mixon.

Paragraph 11(a) of the complaint alleges that Mixon stated that the Respondent would deal harshly with the Union and that there would be repercussions if the Union were elected. The Respondent correctly points out that Mixon never used the words "harshly" or "repercussions." But the evidence shows that Mixon used words to that effect. Specifically, Mixon told the employees "if we have to deal with this Union here at Canton, it will not be on friendly terms." (R. Exh. 44.) While that comment in and of itself is not unlawful, it would be unlawfully coercive if uttered in a context of other unfair labor practices that impart a coercive overtone to the statement. *Reno Hilton,* 319 NLRB 1154, 1155 (1995)

A review of the prepared text of his speech, in pertinent part and in sequential order, shows that Mixon described the impact of unionization at the Respondent's only unionized hard-line distribution center (Greensboro). He told the employees that unions are divisive in nature and create a hostile working environment, which cause efficiency to fall, productivity to go down, and costs to go up. He stated that this happened at Greensboro, where efficiency was down to an unacceptable level, thereby making Greensboro a "liability" to the Respondent. Mixon then gave his personal view of three options for dealing with the problems at Greensboro: (1) major self-help to correct the problems, which he doubted would occur; (2) further reductions in the costs of wages and benefits in the upcoming negotiations; or (3) outsourcing that work or consolidating Greensboro's work with other distribution centers. The unmistakable message was that because of the union the Greensboro employees were worse off than before and at risk of losing their jobs.

Having painted that image in the employees' minds, Mixon then proceeded to tell the Canton employees what they could expect if they elected the Union. In very blunt terms, Mixon stated, "Now, what would happen here if the Union gets in? What can you expect if we have to deal with this Union here at the Canton DC? I want to spell it out as plain as I can. I don't want there to be any surprises six months or a year from now. You have a right to know what to expect before you vote next week." He told the employees that bargaining is a very risky and uncertain process and nobody could be absolutely sure of the outcome. He then stated,

> But I can tell you this, if we have to deal with this Union here at Canton, it will not be on friendly terms. No matter what they say, we are not going to make this Union a partner at the bargaining table. They can ask for anything they want. We will listen, and we will certainly bargain in good faith. We will bargain hard, and we will bargain tough. And we will bargain from a position of strength. We will get the best possible deal for the Company, or there won't be any deal at all—no matter how long it takes. All negotiations will be based on business considerations—not what the Union wants.

Thus, Mixon made it clear that the Respondent was going to take a very hard line in collective-bargaining negotiations.

At that point, Mixon told the employees that if the Union were elected, the Canton employees would be treated no better than the Greensboro employees. He specifically stated, "If the Union comes in, we will have no choice but to take a hard look at whether this DC should be treated any differently than our other unionized DC's. That's not personal, and it is not intended as a threat. That's business. That's an economic reality. Looking at the big picture, why should Canton, if it goes Union, have a better deal than Greensboro or our Softline DC's?" (R. Exh. 44, p. 12.) I find the employees could reasonably infer from Mixon's remarks that if a union was selected it would result in lower wages, like Greensboro, and there was a real possibility that the work at Canton, like Greensboro, could be outsourced or consolidated with another distribution center. In other words, the

employees could reasonably have understood that there could be repercussions if the Union was elected. Thus, I find that Mixon implicitly threatened that there would be repercussions if the Union was elected which imparted a coercive overtone to his statement that the Respondent would not deal with the Union on friendly terms.[10]

The fact that Mixon's remarks were phrased as a strong possibility rather than a certainty does not diminish their coercive impact. What is determinative here is that Mixon's remarks were presented in a prepared text and therefore were fully thought out for the desired effect. There is no evidence, however, that the comments were based on objective fact supporting the Respondent's reasonable belief as to a likely economic consequence of unionization at Canton which was beyond its control. *President Riverboat Casinos of Missouri,* 329 NLRB 77 (1999). I therefore find that Mixon's remarks had the tendency to interfere with the employees' right to freely select or reject union representation without threat of reprisal, express or implied.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 11(a) of the complaint.

Paragraph 11(b) of the complaint alleges that the Mixon stated that the Respondent had considered outsourcing or consolidating its Greensboro facility thereby implying that it would be futile to elect a union at Canton. The evidence shows that Mixon gave his opinion ("As I see it.") that outsourcing or consolidating was one of three "possibilities" for dealing with what he described as the problems at Greensboro. He then implied that Canton would be treated the same if the Union was elected. Again, however, there is no evidence that his remarks were based on objective facts to support a reasonable belief as to the likely economic consequence of unionization at Canton that was beyond the Respondent's control. I therefore find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 11(b) of the complaint.

Paragraph 11(c) of the complaint alleges that the Mixon threatened that the Respondent would outsource or consolidate its Canton operations if the Union was elected. The evidence shows that Mixon impliedly threatened that the Respondent could outsource or consolidate the work at Canton. Although the threat was not direct and although it was presented as a possibility, for the reasons above, I find that it nevertheless tended to interfere with the employees' right under Section 7 of the Act. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 11(c) of the complaint.

G. The Alleged Unlawful Conduct of Arnold Vandercruyssen

Paragraph 12 of the complaint alleges that on May 6, 1999, Supervisor Arnie Vandercruyssen coercively interrogated employees about their support for the Union. There is no credible evidence to support this allegation. Vandercruyssen credibly rebutted the assertions of employee Ricky Brock, which formulate the underpinnings of the allegation. Accordingly, I shall recommend the dismissal of paragraph 12 of the complaint.

H. The Unlawfully Announced Pay Increase

The complaint at paragraph 13 alleges that on May 11 and 12, 1999, the Respondent posted a memo at the Canton facility and announced during employee meetings a wage increase in order to discourage employees from voting for the Union in the upcoming election. As a general rule, benefits granted during the critical preelection period are coercive and therefore unlawful, if they are granted for the purpose of influencing the employees' vote and are of a type reasonably calculated to do so. *Network Ambulances Services*, 329 NLRB 1 (1999). Where the evidence supports a reasonable inference that benefits granted during the critical period are coercive, an employer may rebut this inference by showing that the action was motivated by a legitimate business purpose unrelated to the election. This burden can be met by showing that the benefits granted were part of an established company policy and that the employer did not deviate from that policy upon the advent of the union. *Waste Management of Palm Beach,* 329 NLRB 198 (1999).

The evidence discloses that in May 1997 and 1998, the Respondent announced a wage increase applicable to all nonunionized distribution centers to be effective on or about June 1. In both years, the Respondent followed the same process in determining the amount of the wage increase. In both years, the wage increase was formally presented to the employees in-group meetings.[11] (R. Exhs. 1, 5, and 6.)

In 1999, a wage increase was granted to all nonunionized distribution centers in accordance with the procedure established two years earlier. The evidence shows that the decision to grant this wage increase and to implement it on or about June 1 was made solely by upper management and that the pay increase applied to all nonunion warehouse facilities in system. On the afternoon of Tuesday, May 11, 1999, a telephone conference was conducted by Mixon, Lanni, and Gilooley in the corporate headquarters with all general managers and others at the nonunionized distribution centers. At the Canton facility, Bellerose, Tripp, and Head participated in a corporate telephone conference. Specifically, the managers were advised of the amount of 1999 wage increase for all nonunionized warehouses and walked through a formal presentation of the wage increase that had been prepared by Gilooley. Up until that point, everything was in accordance with the process followed by the Respondent in previous years.

There is no evidence that upper management (i.e., Mixon) established a date certain for announcing the wage increase or otherwise specified a date for explaining the wage increase. The evidence shows that each nonunionized distribution center had the discretion to set up its group meetings for the formal

[10] Mixon's statement that his comments were not intended as a threat supports a reasonable inference that he realized that they could be construed as a "threat."

[11] The unrebutted evidence shows that in 1997, the then general manager for the Canton warehouse, also posted a memo, dated May 9, 1997, announcing that a 25-cent-wage increase had been approved and stating that group meetings would be held the following week to explain the wage increase in greater detail. (R. Exh. 5.) Notably, the memo also stated that in the future "wage increases for all Distribution Centers will be announced each year in *June*." No memo was posted in 1998.

presentation prepared by Gilooley. Operations Manager Mike Tripp testified that the general instructions (via telephone conference call) were to communicate the wage increase to the employees "as soon as you could schedule it. You know, depending on work schedules." (Tr. 593.) It was to be communicated to the employees as soon as the facility could put together general shift meetings.

The evidence shows that at the Billerica distribution center the employees were notified on Thursday, May 13, that there would be shift meetings on Friday, May 14. (R. Exh. 9.) At the Newman distribution center, a memo was posted May 11—the same day as the telephone conference call—announcing "All Team Meetings" for the next day, Wednesday, May 12. The evidence shows that at the Canton facility, Bellerose decided to wait until after the election to have the formal presentations and therefore the communication packet was not formally presented to the employees until "early the next week after the election was done." (Tr. 592, 594, 596.) Thus, contrary to the General Counsel's assertions, I find that the determination to confer a wage increase and the timing of the postelection formal presentations at the Canton facility were conducted in the normal course of business without any motive of inducing the employees to vote against the Union.

In the meantime, however, that is, in between the May 11 telephone conference and the formal presentations to the shift meetings during the week after the election, the Respondent did something that it had never done before—something in addition to its "normal business " practice. Specifically, the evidence shows that immediately after the conference call ended, Bellerose, Tripp, and LRIS (the management consultants hired by the Respondent for the union election) prepared a memo from Bellerose to the employees explaining in summary fashion that there would be an wage increase, the amount of the wage increase, when it would take effect, and to who it would apply. (GC Exh. 9.) While the memo was similar in some respects to the 1997 memo posted by the then general manager of the Canton facility (compare GC Exh. 9 and R. Exh. 5), it went beyond simply announcing that a wage increase was forthcoming which would be explained in upcoming meetings the following week. It raised the issue of whether the wage increase was an attempt to influence the election by stating:

> Here at Canton, NLRB rules prevent us from holding group meetings about election matters this week from Wednesday at 10:30 a.m. through Sunday at 12 p.m. Although the General Wage Increase is not tied to the election, it is possible that any group meetings to explain the increase may turn into meetings about the election. Therefore, I am postponing our discussion about the details of the increase until after the election. This will avoid the appearance of trying to influence your vote. Let me assure you that the increase here does not depend on the outcome of the election.

The Respondent has not explained why it was necessary for Bellerose to mention the election in the memo of announcing the wage increase.[12] There is no evidence that the employees were expecting group meetings on a wage increase in mid-May. To the contrary, the evidence shows that various employees had various recollections of when and how in years past they were advised of a wage increase. There is no evidence that as a matter of policy the formal presentations explaining the wage increase were always held immediately following the posting of a memo announcing there would be a wage increase.[13] In 1997, a memo was posted on Friday, May 9, and the group meetings were held sometime the following week. In 1998, there was no memo posted and the evidence does not disclose when the group meetings were held. The Respondent's burden is to show that the posting would have been made at the same time and in the same manner even if there had been no union election. *Waste Management of Palm Beach,* supra. Thus, I find that there was nothing "normal" about posting the memo or its discussion about why grouping meetings were going to be held the following week.

In addition, the evidence shows that soon after the Bellerose memo was posted, the Respondent held a 25th–hour meeting with the employees in the warehouse as part of its final effort before the election to persuade the employees to vote against the Union. Tripp spoke for the Respondent from an elevated podium draped with a "VOTE NO" banner. Reading from a prepared text, he reminded the employees that when Mixon spoke to them a week or so earlier, Mixon told them that the Respondent was not planning to reduce their wages. Tripp also reminded the employees that they had challenged Mixon to put that promise in writing. Tripp then read a letter, dated May 12, from Mixon to the employees stating that there were no plans to reduce wages, which he described as a sign of the Respondent's commitment to the employees. (GC Exh. 10.)

Tripp then went one step further stating that while "signs" are important, actions are more important, which was a segue to announcing that a wage increase had just been approved. Specifically, Tripp stated:

> I have seen union handouts saying Kmart has announced plans to cut the bank of hours, and even that Kmart will cut associate pay. These union statements are simply false. Just this afternoon/yesterday, the Kmart Distribution Network announced a General Wage Increase for associates throughout the Network. For most associates here that means an increase of 50 cents an hour. That adds up to over $1000 a year at straight time. I don't believe a company with so-called plans to cut things-as the union has claimed—would do this. While not tied in any way to this election, the announced increase goes to the heart of demonstrating that the union has been absolutely wrong about what it tells associates in its attempt to get your vote. [R. Exh. 47, p. 6.]

Thus, Tripp went beyond merely telling the employees that there was going to be a wage increase. He capitalized on wage increase to discredit the Union. Not only was the announcement of the wage increase during the 25th–hour meeting a deviation from the

[12] In contrast, a generic memo was posted in the Billerica warehouse on Thursday, May 13, 1999, simply announcing that there would be meetings on Friday, May 14, without even mentioning a wage increase. (R. Exh. 9.)

[13] The decision to hold the formal presentations after the election in no way jeopardized or delayed the implementation of the wage increase that was scheduled to take place on or about June 1. *Heckethorn Mfg. Co*., 208 NLRB 302, 306 (1974), enfd. 504 F.2d 425 (6th Cir. 1974).

established policy of using formal presentations to review and to explain the wage increases to the employees, the evidence shows that the Respondent used the wage increase to discourage support for the Union.[14]

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 13 of the complaint.

I. Objections

In the election conducted on May 13 and 15, there were 367 votes against union representation, 206 votes for the Union. The Union filed timely objections to the conduct of that election on May 21.[15]

I have found that the Respondent has violated Section 8(a)(1) of the Act in the following manner: by announcing the wage increase on May 11 and 12, 1999 in a posted memo which referenced the upcoming election and in 25th–hour employee meetings during which the Respondent used the wage increase to discredit the Union (Objection 1); by Supervisor Charles Robinette coercively interrogating a group of noncons employees on March 16 and by General Manager Bill Bellerose coercively interrogating employees at the birthday party meeting (Objection 2); and by enforcing in a discriminatory manner its no-solicitation and no-distribution policy by prohibiting employees Neil Currin and Tom Hooks from distribution prounion material outside the entrance to the warehouse building (Objection 5).

With the exception of Supervisor Robinette's coercive interrogation, all of the above objections occurred within the critical period. The Board has long held "conduct violative of Section 8(a)(1) is, a fortiori, conduct that interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical,* 137 NLRB 1782, 1786–1787 (1962). The Respondent argues that the possibility of this conduct affecting the election is remote considering the margin of votes in the election. I reject this contention. The wage increase announcement was made the day before the election and specifically was used to discredit the Union. It was made by the general manager and the assistant general manager, the two top management officials at the facility, and disseminated to all of the employees. The coercive interrogation was made by the general manager to a group of employees and was calculated to persuade them to vote against the Union. Finally, the general manager's prohibition against distributing prounion literature outside the entrance to the warehouse building during a shift change in a nonworking area on nonworking time affected more than a few employees. Under these circumstances, the Respondent's unlawful conduct cannot be said to be isolated, remote or otherwise de minimus. I find that the conduct warrants the election be set aside and a new election be conducted.

Accordingly, I shall recommend an order requiring that the results of the election conducted on May 13 and 15, 1999, in Case 7–RC–21537 be set aside and a rerun election conducted.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Encouraging its employees to report to management instances of employees' pressuring or harassing other employees to support the Union.

(b) Discriminatively enforcing a no-solicitation and no-distribution rule by prohibiting the distribution of prounion literature outside the entrance to the warehouse building during nonworking time in a nonworking area.

(c) Coercively interrogating employees about their support for the Union.

(d) Implying to employees that their union support was viewed as being disloyal to the employer, which resulted in the denial of employee benefits.

(e) Implying to the employees that it would be futile to elect a union and that there would be repercussions if they did so.

(f) Implicitly threatening employees that their jobs would be outsourced or consolidated at another location if they selected a union.

(g) Announcing a wage increase the day before election in a manner that referenced the upcoming election and discredited the Union.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The conduct described in paragraphs 3(b), (c), and (g) above, also constitute objectionable conduct affecting the results of the representation election held in Case 7–RC–21537 on May 13 and 15, 1999.

6. The Respondent has not engaged in any unfair labor practice not specifically found herein.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist from this conduct.

In addition, having found that the Respondent engaged in objectionable conduct affecting the results of the election in Case

[14] To drive home the point, after Tripp's speech, the Respondent handed out copies of Mixon's May 12 letter, which emphasized that the Respondent had no plans to cut wages and that it had a history of providing wage increases around June 1.

[15] In its posthearing brief, the Union argues that the following objections warrant overturning the results of the union election: Objection 1—concerning the wage increase announced on May 11 and 12; Objection 2—concerning unlawful interrogation by Supervisor Charles Robinette in March 1999 and by General Manager Bill Bellerose at the birthday party meeting in April 1999; Objection 3—concerning the number and type of prizes raffled at the May 1 open house; and Objection 5—concerning the discriminatory enforcement of the Respondent's no-solicitation and no-distribution policy vis-à-vis the written policy which purportedly appears in an employee handbook, the prohibition of employees Currin and Hooks from distribution prounion materials outside the entrance to the warehouse building, and the distribution of antiunion literature and paraphernalia by employees and supervisors during working hours in working areas. No other objections of record are advanced in the Union's posthearing brief. The Respondent points out in its posthearing brief at p. 2 that a number of objections were withdrawn by Union. Thus, only those objections argued on brief by the Union have been considered herein.

7–RC–21537, I shall recommend that the election held in the case on May 13 and 15, 1999, be set aside, that a new election be held at a time to be established in the discretion of the Regional Director, and that the Regional Director include in the notice of election the following *Lufkin Rule*[16] language:

NOTICE TO ALL VOTERS

> The election conducted on May 13 and 15, 1999, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, K-Mart Corporation, Canton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging its employees to report to management instances of employees' pressuring or harassing other employees to support the Union.

(b) Discriminatively enforcing a no-solicitation and no-distribution rule by prohibiting the distribution of prounion literature outside the entrance to the warehouse building during nonworking time in a nonworking area.

(c) Coercively interrogating employees about their support for the Union.

(d) Implying to employees that their union support was viewed as being disloyal to the Employer, which resulted in the denial of employee benefits.

(e) Implying to the employees that it would be futile to elect a union and that there would be repercussions if they did so.

(f) Implicitly threatening employees that their jobs would be outsourced or consolidated at another location if they selected a union.

(g) Announcing a wage increase the day before election in a manner, which referenced the upcoming election and discredited the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Canton, Michigan, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.[19]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT encourage employees to report to us instances of employees' pressuring or harassing other employees to support the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO or any other union.

WE WILL NOT discriminately enforce a no-solicitation and no-distribution rule by prohibiting the distribution of prounion literature outside the entrance to the warehouse building during non-working hours in a nonworking area.

WE WILL NOT coercively interrogate employees about their support for the UAW or any other union.

---

[16] *Lufkin Rule Co.*, 147 NLRB 341 (1964).

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[19] This Order also serves as a ruling on the contentions made on brief in the Respondent's motion to dismiss.

WE WILL NOT imply to employees that supporting the UAW or any other union is viewed as being disloyal to the us and could result in the denial of employee benefits.

WE WILL NOT imply to employees that it would be futile to elect the UAW or any other union and that there would be repercussions for doing so.

WE WILL NOT implicitly threaten that jobs will be outsourced or consolidated at another location if you select the UAW or any other union to represent you for collective-bargaining purposes.

WE WILL NOT announce a wage increase in a manner to influence the outcome of any union election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

K-MART CORPORATION